IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

ROBERT BRUCE MOORE, JR.,
Petitioner,

vs.

HAROLD CARDWELL, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LABER, LOVALLO & COLARICH, Ltd.
By: Joseph A. Lovallo
131 E. Broadway
Tucson, Arizona 85701
Attorneys for
Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No._____

ROBERT BRUCE MOORE, JR.,
Petitioner,

vs.

HAROLD CARDWELL, Warden,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEX

	Page
CITATIONS	ii-iv
JURISDICTION	1
QUESTIONS PRESENTED.	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT.	8
CONCLUSION	33
AFFIDAVIT OF SERVICE	28a
APPENDIX A	1a-15a
APPENDIX B	16a-17a
APPENDIX C	18a
APPENDIX D	19a-25a
APPENDIX E	26a-27a

INDEX

	Page
CITATIONS	ii-iv
JURISDICTION	1
QUESTIONS PRESENTED.	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING WRIT.	8
CONCLUSION	33
AFFIDAVIT OF SERVICE	28a
APPENDIX A	1a-15a
APPENDIX B	16a-17a
APPENDIX C	18a
APPENDIX D	19a-25a
APPENDIX E	26a-27a

CITATIONS

Page

Cases

Benton v. Maryland, 395 U.S. 74, 89 S. Ct. 2056 23 L. Ed. 2d 707 (1969) 8, 21a

Downum v. United States, 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100 (1963).....15, 21a 4a

Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774 9 L.Ed.2d 899 (1963).....7a

Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L.Ed.2d 901 (1961) 14, 15

Green v. United States, 335 U.S. 184, 188, 78 S. Ct. 221, 224 (1957).....19, 31

Harris v. Wainwright, 399 F.2d 412 8

Illinois v. Sommerville, 410 U.S. 458, 461 93 S. Ct. 1066, 35 L.Ed.2d 425 (1973).....16

Lynch v. Johnson, C.C.A. Cal. (1947) 160 F.2d 950.....8

Palco v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L.Ed. 288 (1937).....8

Citations Cont'd - Page 2

Page

State v. Burrell, 106 Ariz. 100, 471 P.2d 712 (1970) 6a

State v. Crowder, 103 Ariz. 264, 440 P.2d 29 (1968).....6a

State v. Fenton, 19 Ariz. App. 274, 506 P.2d 665 (1973) 11

Townsend v. Spain, 372 U.S. 293, 309N, 6, 83 S. Ct. 745, 9 L.Ed.2d 770 13

United States v. Chase, 372 F.2d 453 (Fourth Circuit 1967).....15

United States v. Goldstein, 479 F.2d 1061 (Second Circuit 1973) 13

United States v. Jorn, 400 U.S. 470, 486, 91 S. Ct. 547, 13, 15
558, 27 L.Ed. 543 ..... 18, 31

United States v. Lansdown, 460 F.2d 164, 169 (Fourth Circuit 1972) 16, 24, 26

United States v. Perez, 9 Wheat 9, 11
579, 6 L.Ed. 165 (1824) 12, 14

United States ex rel Russo v. Superior Court of New Jersey 12, 19
etc., 483 F.2d 7, 17 (1973) 24, 26

Citations Cont'd - Page 3

Page

United States v. Smith, 390 F.2d 420 (Fourth Circuit 1968).....15

United States v. Superior Court of New Jersey, 483 F.2d 7, 14 (1973).....15

United States ex rel Thomas v. State of New Jersey, 472 F.2d 735, 737, 738 (Third Circuit 1973).....13

Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed.2d 974 (1948).....11, 13

Wilson v. Phend, 417 F.2d 1179

GENERAL LEGAL PUBLICATIONS

ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, Sec. 54 (c) pp. 156-157.....17

77 Harvard L. Rev. 1272, 1274 (1964).....14

JURISDICTION

Appellant, ROBERT BRUCE MOORE, JR., was charged by the State of Arizona in a two count information with attempted murder and armed robbery. He was tried for those alleged offenses beginning September 1, 1970, in the Superior Court of Pima County, Arizona. That trial consisting of approximately 35 hours of evidence taking spread over 12 days ended in a mistrial declared sua sponte by the trial court. Thereafter, Appellant moved to quash the information on the grounds that he had been once in jeopardy. This motion was denied on October 14, 1970.

On November 16, 1970, Appellant was retried on the same charges. He again moved to dismiss the information on the grounds of double jeopardy, but this motion was also denied.

ROBERT BRUCE MOORE, JR., was found guilty of both offenses on December 18, 1970. He was sentenced to the Arizona State Prison for concurrent terms of not less than 20 nor more than 30 years on Count One and not less than 10 nor

more than 20 years on Count Two.

Appellant filed timely motions for new trial and directed verdict of acquital notwithstanding the verdict, which were denied. These motions raised the same federal questions as presented here.

Upon timely appeal, the Arizona Supreme Court examined the conviction and found no abuse of discretion by the trial judge in declaring a mistrial. A Motion for Rehearing before the Arizona Supreme Court was denied.

Thereafter, Appellant sought relief in the Supreme Court of the United States by Petition for Writ of Certiorari to the Supreme Court of the State of Arizona. That petition was denied on May 21, 1973.

On November 15, 1973, Appellant filed a Petition for Writ of Habeas Corpus in the United States District Court for the District of Arizona. No response was filed by the State of Arizona. On December 18, 1973, the Honorable Walter E. Craig denied Appellant's writ without an Order to Show Cause or hearing.

Notice of Appeal and Application

for Certificate of Probable Cause were filed by Petitioner on January 2, 1974. A Certificate of Probabe Cause was issued by the Honorable Walter E. Craig, Judge of the United States District Court, on January 8, 1974.

Timely appeal was filed with the U. S. Court of Appeals for the Ninth Circuit on December 23, 1973 and the judgment of the United States District Court was affirmed on October 4, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Is the retrial of an accused whose trial has been discontinued because the jury was unable to agree always without the constitional prohibition against double jeopardy under the Fifth Amendment of the Federal Constitution as made applicable to the States by the Fourteenth Amendment?

2. Can summary discharge of a jury and ordering of a mistrial ever be so capricious that a retrial amounts to a violation of the Double Jeopardy Clause of the Fifth Amendment of the Federal Constitution as made applicable to the States by the Fourteenth Amendment?

STATEMENT OF THE CASE

Petitioner, ROBERT BRUCE MOORE, JR., was charged in a two count information with attempted murder and armed robbery. He was tried for those alleged offenses beginning September 1, 1970, in the Superior Court of Pima County, Arizona. The trial consisted of approximately 35 hours of evidence taking spread over 12 days.

The case was submitted to the jury at 3:55 p.m., on September 19, 1970. At 10:50 p.m. on that date, the jury was called into the courtroom. The Court questioned the jurors as to the possibility of reaching a verdict within a reasonable time. The jury indicated that day it stood (8 to 4) eight to four and were ordered to continue deliberating.

On September 19, 1970, the jurors reported they were (9 to 3) nine to three and requested to hear the taped instructions, which request was granted. They also asked the court to define some psychological terms, but the court refused.

At approximately 3:00 p.m. that day the court summoned the jurors into the courtroom and delivered an Allen charge. At 4:48 p.m., after approximately 12 hours of total deliberation, the court again summoned the jury before it. What follows is a reconstruction of the proceedings (there having been no transcript) which was accepted by the court below.[1]

---

[1] There was no court reporter during any of the court proceedings which took place after the case was submitted to the jury. At the October 14, 1970 hearing on Petitioner's motion to quash the information, his counsel related what occurred in the courtroom after the jury had begun its deliberations, including what transpired at the time the jury was discharged. The Arizona Supreme Court accepted defense counsel's recitation of the facts, which varied only slightly from the account rendered by the prosecution.

"The Court asked the jury, or he asked the foreman to stand, and he said, 'Mr. Foreman, can you give us any indication about how the vote is going?'

"And the foreman said, 'Your Honor, we are still deadlocked at eight to four.' And the Court then asked the foreman, 'What are your feelings with reference to whether or not you can reach a verdict?'

"And to the best of my recollection, the foreman said, 'At this time, Your Honor, the probability in my opinion of reaching a verdict is not very good.'

"So, the Court asked the jury collectively:

'Is there anyone here on the jury that feels further deliberation might have some results?'

"And a lady sitting in the front row, I believe on the lower

> left-hand side as you would be looking at the jury, the first lady on the left raised her hand. And the Court acknowledged her hand and she said: 'I feel that, with further deliberation we could reach a verdict.'
>
> "And almost instantaneously the Court said, 'Well, you are outnumbered, and I am declaring a mistrial, and this jury is now discharged.'"

Minute Entry of September 19,1970, states:

> "The Court questions the jurors and states:
>
> 'It appearing that there is no reasonable probability that the jurors can agree upon a verdict, a mistrial is declared and the jury is excused.'"

The District Court having denied Appellant's Petition for Writ of Habeas Corpus without issuance of an Order to

Show Cause, all of the allegations of fact contained in the petition must be treated as true. Lynch v. Johnson, C.C.A. Cal. (1947) 160 F. 2d 950; Wilson v. Phend, 417 F. 2d 1179; Harris v. Wainwright, 399 F. 2d 412.

REASONS FOR GRANTING WRIT

I

The prohibition against double jeopardy found in the Fifth Amendment to the United States Constitution is made applicable to the states by Benton v. Maryland, U395 74, 89 S. Ct. 2056, 23 L. Ed. 2d 707 (1969). In that case the Supreme Court overruled its earlier holding in Palco v. Connecticut, 302 U.S. 319, 58 S. Ct. 149, 82 L. Ed. 288 (1937) that federal double jeopardy standards were not applicable to state criminal proceedings. Thus federal constitutional double jeopardy principles are applicable to state court trials such as Appellant Moore's 1970 trial.

Since 1924 the courts of the United States have attempted to follow a "manifest necessity" doctrine first enunciated

by Chief Justice Story in the now famous case of United States v. Perez, 9 Wheat 579, 6 L. Ed. 165 (1824). In that case the Supreme Court attempted to delineate certain paramters which might be used by a trial court in the exercise of its discretion to declare a mistrial without defendant's consent. While preserving the government's right to re-prosecute, the Supreme Court in that case stated:

> "We think, that in all cases of this nature, the law has invested courts of jurisdiction with the authority to discharge a jury from giving any verdict, whenever in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends or public justice would otherwise be defeated. They are to exercise a sound discretion on this subject; and it is impossible to define all the circumstances, which

> would render it proper to interfere. To be sure, the power ought to be used with the great caution under urgent circumstances, and for very plain or obvious cases; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life, in favor of the prisoner. But, after all, they have the right to order the discharge; and the sincerity which the public have for the faithful, sound and conscientious exercise of this discretion, rest, in this as in all other cases, upon the responsibility of the judges, under their oaths of office."

Since 1824, the courts of the United States have consistently held that as a general rule a defendant may be retried if in his first trial the jury is unable to reach a unanimous

verdict. See generally, Annotation: Double Jeopardy - Mistrial, 6 L. Ed. 2d 1510, 1517-1518. A genuine inability by the jury to reach a verdict has been determined to be a "manifest necessity" under Perez, supra. Thus a mistrial may be declared because a defendant's right not to be subjected to jeopardy twice for the same crime must be subordinated to the public's interest in fair trials and just judgments on the merits. See Wade v. Hunter, 336 U. S. 684, 69 S. Ct. 834, 93 L. Ed. 2d 974 (1948).

"Manifest necessity" must be present, then, for a trial judge to declare a mistrial and still preserve for the State the right to prosecute a defendant. In this regard, the trial court's discretion to declare a mistrial and dismiss the jury short of a verdict without a defendant's consent[1] is necessarily broad and is reviewed on appeal by the abuse of discretion standard.[2]

---

[1]Under Arizona law mere silence or failure to object is not such a consent as will constitute a waiver of a former jeopardy plea. See State v. Fenton, 19

In defining standards for the exercise of discretion by the trial courts in cases similar to the one at bar, the United States Supreme Court has continuously adhered to the formulation of Justice Story in United States v. Perez supra. Beyond these generalized quidelines which the Court has emphasized, each case turns on its own facts. See

Ariz. App. 274, 506 P. 2d 665 (1973). See also United States ex rel Russo v. Superior Court of New Jersey, etc. 483 F. 2d 7, 17 (1973) where the court disposes of the claim that proper objection to discharge should be made while the jury is in the box. "While the better practice may be to object as soon as counsel learns that a mistrial is to be granted, ...(Citations omitted) Appellant's counsel was in a difficult situation. He had no advance warning or notice that a mistrial was to be declared; ...Also to have objected in front of the jury might have prejudiced Appellant for tryin to "show up" the trial judge, especially if some members of the jury actually did want to go home despite their civic obligation. In this situation, we cannot penalize Appellant for failing to object sooner."

[2]The question of whether or not "manifest necessity" existed to justify the declaration of a m strial and the discharge of the jury short of a verdict and after

See United States v. Goldstein, 479 F. 2d 1061 (Second Circuit 1973).

The Perez doctrine embraces two components, "a defendant's valued right to have his trial completed by a particular tribunal", and "the public's interest in fair trials designed to end in just judgments." See Wade v. Hunter, supra; Illinois v. Sommerville, 410 U.S. 458, 461 93 S. Ct. 1066, 35 L. Ed. 2d 425 (1973).

The Supreme Court in Wade v. Hunter, supra, specifically recognized that the double jeopardy clause of the Fifth Amendment safeguards the defendant's "valued right to have his trial completed by a particular tribunal", which "he might believe to be favorably disposed to his fate", United States v. Jorn, 400 U.S.

---

jeopardy has attached, is a mixed question of law and fact which this court can freely review. Eg. Townsend v. Spain, 372 U. S. 293, 309 N. 6, 83 S. Ct. 745, 9 L. Ed. 2d 770, United States ex rel Thomas v. State of New Jersey, 472 F. 2d 735, 737, 738 (Third Circuit 1973).

470, 486, 91 S. Ct. 547, 558, 27 L. Ed. 543. See also 77 Harvard L. Rev. 1272 1274 (1964).

The balancing of the competing factors in any particular fact situation requires a delicate exercise of discretion by the trial court judge who is present and thus most able to properly exercise such discretion. Gori v. United States, 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961).

The appellate courts must be cognizant of the mandates of Perez and it is incumbent on them to establish a meaningful and rational parameter by which to review the trial court's exercise of discretion. The doctrine of "manifest necessity" is the conclusionary tip of a large iceberg of factual considerations. Once it has been determined that manifest necessity exists, the operative result is to allow the trial judge to declare a mistrial while preserving for the state the right to continue to prosecute the defendant in further proceedings. Thus the procedure by which manifest necessity

is determined to exist and the process by which appellate courts review the exercise of the trial court's discretion must insure that a process of circular reasoning is not used to justify a result. United States v. Jorn, supra, represents the latest in a line of cases which has the practical effect of narrowing the discretion of the trial judge to declare a mistrial. See, Downum v. United States, 372 U. S. 734, 83 S. Ct. 1033, 10 L. Ed. 2d 100 (1963); Gori v. United States, supra; United States v. Smith, 390 F. 2d 420 (Fourt Circuit 1968); and United States v. Chase, 372 F. 2d.453 (Fourth Circuit 1967).
(EMPHASIS ADDED).

In an attempt to formulate standards to insure meaningful review and yet allow each case to turn on its own facts, the Third Circuit has set out some minimum standards for the review of a trial court's declaration of a mistrial in cases where the jury has been unable to reach a verdict. In United States v. Superior Court of New Jersey, 483 F. 2d.

7, 14 (1973), the Third Circuit stated:

> "..(W)e must at least look at the possiblity of manipulation inherent in the procedure complained of, the alternatives available to the trial judge at the time, and the presence of some important countervailing interest of proper judicial administration." (Citations omitted).

The Court went on to say that even in cases where there is no possibility of manipulation or prejudice to a defendant beyond that of undergoing another trial, the double jeopardy clause will bar the prosecution unless there is an important countervailing interest of proper judicial administration. Illinois v. Sommerville, supra.

The Fourt Circuit in United States v. Lansdown, 460 F. 2d 164, 169 (Fourth Circuit 1972) stated that:

"An analysis of the cases

supporting the general rule discloses that the decision to declare a mistrial in cases of apparent inability to agree is not based solely on the length of time the jury has deliberated. While the length of deliberations is a relevant factor, a more important consideration is whether there is a possiblity that a jury can reach a verdict within a reasonable time. The most reliable sources to this information is the jury itself.

The conclusion that a jury is unable to reach a verdict must be supported by something in addition to the trial court's conclusion that the jury has deliberated long enough."

See also ABA Project on Minimum Standards for Criminal Justice, Trial by Jury, Sec. 54(c) (approved draft 1968) at pages 156-157.

POSSIBILITIES OF MANIPULATION AS A TEST TO BE APPLIED TO THE FACTS AND CIRCUMSTANCES SURROUNDING THE DECLARATION OF A MISTRIAL IN APPELLANT MOORE'S FIRST TRIAL IN SEPTEMBER, 1970.

The concept of manipulation which is proposed above has reference to the delicate balance between the functions of the court and jury and the rights of several parties. The Court, under the doctrine of "manifest necessity" is required to determine whether or not the jury is, in fact, hopelessly deadlocked and unable to reach a verdict on the issue of guilt. It is the province of the jury to determine the issue of guilt or innocence, and it is a defendant's right to have a jury which he believes might be favorably disposed to his cause to continue to deliberate on his case. United States v. Jorn, supra.

Where the jury is deadlocked - the inescapable conclusion is that this jury could not convict the defendant and the defendant has a right to assume that a significant number of the jurors

has sympathy for his cause. The trial judge is in a position to deprive the defendant of this favorable position by an exercise of his discretion to declare a mistrial and such manipulation is extremely difficult to detect on appeal.

As the Supreme Court stated in Green v. United States, 335 U.S. 184, 188 78 S. Ct. 221, 224 (1957):

> "This (jeopardy attaching after the jury is sworn) prevents a prosecutor or judge from subjecting a defendant to a second prosecution by discontinuing the trial when it appears the jury, might not convict." (EMPHASIS ADDED). Quoting from United States ex rel Russo v. Superior Court of New Jersey, supra, at p. 16.

The manner in which the trial court judge arrived at his decision in the case at bar, if affirmed, would promote a rule which could easily lead to manipulation. The Third Circuit alludes to this type of possibility in Russo, supra, at p. 16,

note 15, where it says:

> "We cannot emphasize too strongly that there is nothing to lead us to suspect that the trial judge was guilty of such manipulation. But the possibility exists and is a factor which we definitely must consider. The alternatives are to allow the discretion of the trial judge to go unchecked or to become embroiled in embarrassing inquiries into his motives in each particular case."

The facts and circumstances surrounding the trial of the Appellant might lend support to the existence of manipulation. The crimes Appellant was alleged to have committed were somewhat gruesome. Public feeling and antipathy were at a high point; a heightened interest and curiosity was directed toward the trial of the Appellant by the press and

court personnel. The medium of public attention and hostility could have provided a rich culture for possible manipulation.

WAS.THE TRIAL JUDGE PRESENTED WITH A SITUATION WHERE THE EXERCISE OF A SOUND DISCRETION WOULD REQUIRE THE COURT TO RESORT TO OTHER ALTERNATIVES RATHER THAN THE DECLARATION OF A MISTRIAL?

Appellant, ROBERT BRUCE MOORE, JR., was charged in a two count information with attempted murder and armed robbery. He was tried for these alleged offenses beginning September 1, 1970, in the Superior Court of Pima County, Arizona. The trial consisted of approximately 35 hours of evidence taking spread over 12 days. Extensive testimony from psychological experts was presented by both the Appellant and the State of Arizona.

The case was submitted to the jury at approximately 3:55 p.m. on September 18, 1970. At 10:50 p.m. on that date, the jury was called into the courtoom. The Court questioned the jurors as to

the possibility of reaching a verdict within a reasonable time. The jury indicated on that day it stood (8 to 4) eight to four.

On September 19, 1970, the jurors requested to hear the taped instructions, which request was granted. They also asked the Court to define some psychological terms, but the Court refused. At approximately 3:00 p.m. that day the Court delivered an Allen charge, which told the jury they could be leisurely in their deliberations. At 4:48 p.m., after only 12 hours of total deliberation, the Court again called the jury before it. What follows is a reconstruction of the proceedings had therein. No transcript is available since a court reporter was not present during the following interchange between Court and jury.[3]

---

[3]There was no court reporter during any of the court proceedings which took place after the cause was submitted to the jury. At the October 14, 1970 hearing on petitioner's motion to quash the information, his counsel related what occurred in the

"The Court asked the jury, or he asked the foreman to stand, then he said, 'Mr. Foreman, can you give us an indication about how the vote is going?'

And the foreman said, 'Your Honor, we are still deadlocked at (8 to 4) eight to four.[4]

And the Court then asked the foreman, he said, 'What are your feelings with reference to whether or not you can reach a verdict?'

And to the best of my recollection, the foreman said, 'At this time, Your Honor, the probability in my opinion of reaching a verdict is not very good.'

So the Court asked the jury collectively: "Is there anyone

---

courtroom after the jury had begun its deliberation, including what transpired at the time the jury was discharged. The Arizona Supreme Court accepted defense counsel's recitation of the facts, which varied only slightly from the account rendered by the prosecution.

here on the jury that feels further deliberation might have some results?' And a lady sitting in the front row, I believe, on the lower left-hand side as you would be looking at the jury, the first lady on the left, raised her hand. And that Court acknowledged her hand and she said: 'I feel that we could reach a verdict.'

And almost instantaneously the Court said, 'Well, you are outnumbered, and I am declaring a mistrial, and this jury is now discharged.'"

---

[4] In the opinion of the Supreme Court of Arizona, Appendix A, page 9a, the Court acknowledges that during the 12 hours of deliberation there was a movement in the numerical division of the jury from (8 to 4) eight to four to (9 to 3) nine to three.

The Sixth Circuit in United States v. Lansdown, supra, states:

> "The conclusion that a jury is unable to reach a verdict must be supported by something in addition to the trial court's conclusion that the jury has deliberated long enough. (Footnote omitted)."

Lansdown, supra, is instructive and has application in this case for the reason that its ratio decendi seems to require that there be something in the record which will justify the trial court's exercise of discretion.

In Russo, supra, the Third Circuit seems to build on Lansdown. In the latter case the issue was whether fatigue of the jury would be sufficient reason to discharge. In that case the court at 483 F. 2d 7, p. 16 stated:

> "Not only was there no inquiry as to the physical condition of the jurors, there was no questioning them as to their progress

towards reaching a verdict. Before the defendant loses his Fifth Amendment right, we think that the trial judge must at least determine whether the jury is approaching a verdict."

In the case at bar, the trial court did attempt to determine whether the jury was approaching a verdict. However, the trial court failed to avail itself of the opportunity to· (1) Send the jury back to specifically deliberate the actual possibility of reaching a verdict if further deliberation were allowed; (2) Poll each juror concerning the possibility of reaching a verdict.

On the contrary, the trial court chose to ignore the fact that one juror did feel that a verdict was possible. It would not have required a great expenditure of legal resources or effort to have investigated the possibility of a verdict in the light of a statement made by one juror that the possibility of a verdict existed.

The issues presented to the jury in the case at bar were complex. The trial consumed 12 days and approximately 35 hours of evidentiary presentation. Earlier on the 19th of September 1970, the day the jury was discharged, the jurors had requested to hear taped instructions and had requested the Court to define some psychological terms. At 3:00 p.m. on the same date the Court delivered an Allen charge. One hour and forty-eight minutes later the jury was discharged. It is not unexpected then, that the jury might still be undecided and yet be capable of reaching a verdict, one hour and forty-eight minutes after the trial court had informed them, via Allen instruction, that they could leisurely deliberate until a verdict was reached. (See Russo, supra, at p. 16.)

The language used by the Lansdown court, supra, at 460 F 2d at 169 in its appraisal of a trial judge's exercise of discretion is apropos here:

> "We must conclude that there was not 'manifest necessity' in this case for declaring a

mistrial when the district court did so. The district court, without considering any other factors, simply concluded that approximately 11 hours of deliberation, in a case presenting a close question of credibility, was long enough. The district judge did not seek the opinion of counsel or the defendant; after having told the jury that it could be 'leisurely in its deliberations', he made no inquiry as to whether the jury was about to reach a verdict or thought that a verdict was possible. Indeed, he rejected statements from the jury that it was on the verge of a verdict and wished to continue. The jury was dismissed at approximately 1:00 p.m. The jurors would have suffered little additional hardship if required to remain at least until the end of the day. Under these circumstances, we believe that the

> district court failed to protect adequately the defendant's right to have his case decided by a particular tribunal." (Footnotes omitted).

Finally, it should be noted that upon the record, it would appear that the trial court confused the jury's stance on the issue of guilt or innocence with the separate and distinct issue of whether or not a verdict could be reached if more time were allowed for deliberation. It has been assumed throughout the Appellant's post-conviction proceedings, that the jury stood (11 to 1) eleven to one on the issue of whether or not a deadlock existed. The trial court may have been justified in addressing his query as to the possibility of a verdict to the foreman in the first instance; however, it should be noted that the foreman had not been specifically instructed to ascertain the jury's position on this point. Thus, in a practical sense he was qualified only to give his personal appraisal of the situation. His response was couched in a personal, subjective manner and his response to the

trial judge's question only referred to probabilities.

> "At this time, Your Honor, the probability in my opinion of reaching a verdict is not very good."

The equal and opposite point of view expressed by another juror made the score one to one on the issue of reaching a verdict. The fact that no other juror responded may be attributed to many unknown and unascertainable factors; one of which could be that the possible points of view had already been expressed.

Speculation as to the jury's actual position of, on either the issue of guilt or the probability of reaching a verdict is apt to be of little value at this point. The fact remains that a reasonable possibility of a verdict exists on the record, and the trial court made no effort to explore reasonable alternatives to a mistrial. If "manifest necessity" is to mean anything as a standard this Court should find that none existed in this case.

Appellant's valued right to a particular tribunal was taken away from him here.

WHY THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT SHOULD BE REVERSED AND THE WRIT SHOULD ISSUE:

The United States Supreme Court has not yet dealt with the problems presented in this case in a comprehensive manner as have the Third and Fourth Circuits. Although each case must be resolved on its own facts, some standards for review of a trial court's exercise in declaring a mistrial in fact situations similar to the case at bar should be ennunciated.

Appellant contends that the trial court should be required to make a record and findings of fact upon which an appellate court can menaingfully review its exercise of discretion. The policy behind the Fifth Amendment prohibition against double jeopardy reflects a deep concern and apprehension of the awesome power of the government might be used to subject a citizen to repeated prosecutions for the same alleged offense.

Reprosecution increases the possibilities of a miscarriage of justice. Not only does a retrial expose a potentially innocent defendant to a verdict of guilt, but also exposes the defendant to the additional ordeal involved in another criminal trial with its attendant anxieties, insecurities, embarrassment, and expenses. Green v. United States, supra.

Where a mistrial is declared, the defendant is often deprived of his right to have his trial completed by a particular tribunal which he believes may be favorably disposed to his fate. United States v. Jorn, supra.

It would not be unreasonable to require trial courts when declaring a mistrial, to employ the same procedural precautions which are employed where a quilty plea is taken pursuant to Rule 11 of Federal Rules of Criminal Procedure. The defendant is subjected to the possibilities of losing valuable rights, if forced to undergo a new trial. It is not unreasonable to require a trial judge to explore all reasonable alternatives to

the declaration of a mistrial, and to make such exploration a part of the record which can be reviewed meaningfully. Unless specified findings of fact designed to adequately exhaust all reasonable alternatives to a mistrial are set out in a record, an appellate court cannot do other than ratify a decision which might have been incorrect or subject to manipulation.

CONCLUSION

The Appellant urges that he has been twice placed in jeopardy for the same alleged crimes; That the trial court dismissed the jury *sua sponte* without sufficient legal cause; That such conduct by a trial court has been held by the United States Court of Appeals for the Third and Fourth Circuits to be a violation of the Fifth Amendment prohibition against Double Jeopardy; That the United States Supreme Court should resolve the conflict within the Circuits and set forth procedural guidelines to be followed by the trial court to support the dismissal of a jury *sua sponte*.

Respectfully submitted,

LABER, LOVALLO & COLARICH, LTD

By _____
Joseph A. Lovallo
131 E. Broadway
Tucson, Arizona 85701

APPENDIX A

The STATE of Arizona, Appellee,

v.

Robert Bruce MOORE, Jr., Appellant.

No. 2270

Supreme Court of Arizona,

In Division

Nov. 22, 1972

Rehearing Denied Jan. 2, 1973.

Gary K. Nelson, Atty. Gen., by Jerry C. Schmidt and William P. Dixon, Asst. Attys. Gen., Phoenix, for appellee.

Laber, Morrow, Lovallo & Colarich, by Joseph A. Lovallo, Tucson, for appellant

HOLOHAN, Justice:

The appellant was tried by jury and convicted of the offenses of armed robbery and attempted murder. He was sentenced to confinement in the state

prison, and he brings this appeal.

The first trial of appellant for the above offenses resulted in a mistrial, and it was at a second trial that the challenged conviction was obtained. The appellant does not urge that any reversible error was committed in the course of the second trial, and our review of the record satisfies us that there was no such error.

Appellant challenges his conviction on the basis that he should not have been tried a second time after the mistrial of his first trial. Essentially two questions are presented:

1. Does the absence of a court reporter at the time the events occur upon which a mistrial is based deny a defendant due process of law?

2. Does the record show any legally sufficient reasons for the declaration of a mistrial?

The initial prosecution of appellant began September 1, 1970 and lasted 12 days. The deliberation of the jury began at about 4:00 p.m. the afternoon of September 18, 1970, and it extended into the following day. At the beginning of the second day of deliberation the instructions were reread to the jury. Around 3:00 p.m. the second day the jury requested definitions of the terms "insanity," "psychosis" and "psychotic neurosis." Theses definitions were not given. Instead, the court ordered them to rely on the evidence and the use of the terms in the case. At approximately 4:50 p.m. of the second day of deliberation the trial judge called the jury back to the courtroom. The trial judge asked the foreman if it would be possible to reach a verdict. The foreman expressed the opinion that the jury probably could not reach a

verdict. The jury was reportedly deadlocked at eight to four. The trial judge inquired of the panel whether they thought a verdict could be reached, and only one juror expressed the belief that further deliberation would result in a verdict. The trial judge thereafter declared a mistrial.

The appellant argues that a retrial constitutes double jeopardy which is prohibited by the Fourteenth Amendment, citing Benton v. Maryland, 395 U.S. 784, 89 S. Ct. 2056, 23 L.Ed.2d 707 (1969). Appellant recognizes that there are situations in which a jury can be dismissed without jeopardy attaching, and one of these occurs when the jury is unable to reach a verdict. The discretion to discharge the jury, appellant urges,may be exercised only in extraordinary and striking circumstances. Downum v. United

States, 372 U.S. 734, 83 S. Ct. 1033, 10 L.Ed.2d 100 (1963).

[1] Appellant's threshold point is that there is no record from which this Court can review the question of whether the trial judge abused his discretion in the discharge of the jury. A court reporter was present throughout the trial, and a transcript has been prepared and filed, but the reporter was not present at any session after the jury began its deliberation. There is no stenographic transcript of the proceedings of September 19, 1970, the second day of deliberation and the day upon which the mistrial was declared. From this fact the appellant argues that there is no record, and he must be discharged. We do not agree.

[2] The appellant was entitled to the presence of a court reporter at all sessions of the court. Rule 252, Rules of

Criminal Procedure, 17 A.R.S. A court reporter had been instructed, but the appellant did not request the presence of a reporter at any such session, and appellant took part in such sessions without once requesting a court reporter.

In State v. Crowder, 103 Ariz. 264,440 P.2d 29 (1968), we held that where no objection was made by the defendant to proceeding to trial without a reporter, he waives his right to thereafter complain that the proceedings were not reported. The holding in Crowder was reaffirmed in State v. Burrell, 106 Ariz. 100, 471 P.2d 712 (1970), and we held that the right to have the proceedings taken down and transcribed may be waived.

[3] Due process does not require a stenographic transcript in every case. Alternative methods of reporting trial proceedings are permissible if they place

before an appellate court an equivalent report of the events at trial from which the appellant's contensions arise. The material before the state court must constitute a record of sufficient completeness for adequate consideration of the errors assigned. Draper v. Washington, 372 U.S. 487, 83 S. Ct. 774, 9 L.Ed. 2d 899 (1963).

Putting aside the fact of waiver of a court reporter, we find that there is a sufficient record before us which meets the test of Draper, supra. The record sent forward to us includes, among other documents and exhibits, the minutes taken by the clerk at all sessions of the court including those after the jury had begun its [de]liberation and including the session at which the trial judge ordered the mistrial. In addition, there is a reporter's transcript of the

argument and representations made by counsel for appellant at the Motion to Quash the inforamtion in this case. For the purposes of reviewing this matter we will accept the statements of counsel for appellant made in the motion as true.

[4] For many years it has been recognized that a defendant may be retried after a trial judge had, without the defendant's consent, discharged a jury unable to agree on a verdict. United States v. Perez, 9 Wheat. 579, 6 L.Ed. 16 5 (1824). This position has been reaffirmed in Wade v. Hunter, 336 U.S. 684, 69 S. Ct. 834, 93 L.Ed. 974 (1949), and United States v. Jorn, 400 U.S. 470, 91 S. Ct. 547, 27 L.Ed.2d 543 (1971).

Disagreement by the jury is not the only cause for mistrial as pointed out in Gori v. United States, 367 U.S. 364, 81

S. Ct. 1523, 6 L.Ed.2d 901 (1961), the Court said:

> "Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision the ends of substantial justice cannot be attained without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment."
>
> [Citing cases] 367 U.S. at 368, 81 S. Ct. at 1526, 6 L.Ed.2d at 904.

[5] The issue resolves itself into whether under all the circumstances the trial judge acted in the exercise of sound discretion by declaring a mistrial. If he did, there is no double jeopardy

and the defendant was properly tried. If he did not, the defendant should not have been retried.

[6] Appellant additionally urges that there has not been compliance with Rule 303, Rules of Criminal Procedure, in that the entry which showed the jury was being discharged did not reflect a sufficient showing of the reason for the discharge. Therefore, there is no way to determine whether the trial judge exercised sound discretion.

The minutes reflect:

> "4:48 p.m. Deft., counsel and jury present.
>
> "The court questions the jurors and states:
>
> > "It appearing that there is no reasonable probability that the jurors can agree upon a verdict, a mistrial is

declared, and the jury is excused.

"Mr. Weiss moves that the trial not be reset on the calendar until after the trial in Case #A-17578 [.]

"Mr. Colarich moves for a directed verdict of acquittal on the ground that with the evidence, the length of deliberation, and the giving of the Allen instruction, there is a reasonable doubt of the guilt of the Deft., and

"IT IS ORDERED that the Motion is denied.

"As to the new trial date,

"Mr. Colarich argues to the Court.

"IT IS ORDERED that the trial

this action be set to follow the trial in Case #A-17578, without prejudice to the right of the Deft. to file any motion for continuation.

"Deft. is remanded to the custody of the Sheriff."

Rule 303 must be read in connection with Rule 302, Rules of Criminal Procedure which provides:

"Rule 302. Discharge of jurors.

"A. After the jurors have retired to consider their verdict the Court shall discharge them when:

"1. Their verdict has been recorded.

"2. A necessity exists for their discharge.

"3. Upon expiration of such

time as the court deems proper it appears that there is no reasonable probability that the jurors can agree upon a verdict.

"B. The court may in any event discharge the jurors from the action if the county attorney and the defendant consent to such discharge."

There is no magic formula required by Rules 302 and 303. The trial court correctly set forth the reasons for discharge of the jury as being that provided for in 302, subsec. A, par. 3. Nothing more was required.

[7] The record presented shows that the jury had been given the case for over 24 hours. While appellant argues that only some nine hours of deliberation time had been used, it must be granted that each juror had had many hours additional

for individual reflection and consideration. Despite the length of time involved, the jury remained divided at either 8 to 4 or 9 to 3, depending upon which recollection is accepted.

A 9-3 division after 24 hours of deliberation, the statement of the foreman that agreement by the jury was unlikely and agreement by all but one juror that further deliberation would not be fruitful constituted a sufficient basis for declaration of a mistrial.

A trial judge is often presented with a dilemma in situations involving long deliberation by juries. If he insists on prolonging the deliberation after the jurors have expressed the feeling that they cannot reach a verdict, the trial judge may then be accused of trying to coerce a verdict. In the case at issue, the trial court is alleged to have de-

cleared the mistrial too soon. From our review of the material presented, it appears thatthe jury was deadlocked. Hence, the trial judge exercised sound discretion in declaring a mistrial and setting the matter for another trial.

The judgment and sentence of the appellant are affirmed.

HAYS, C.J., and CAMERON, V. C. J., concur.

APPENDIX B

SUPREME COURT
STATE OF ARIZONA
PHOENIX
85007

January 4, 1973

THE STATE OF ARIZONA,	)	
	)	Supreme Court
Appellee,	)	No. 2270
	)	
v.	)	Pima County
	)	No. A-17509
ROBERT BRUCE MOORE, JR.,	)	
	)	
Appellant.	)	
	)	

The following action was taken by the Supreme Court of the State of Arizona on January 2, 1973 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - DENIED."

Certified copy of Order Affirming Judgment and Sentence issued this date.

CLIFFORD H. WARD, Clerk
By Mary Ann Hopkins
Deputy Clerk

TO:

Joseph A. Lovallo, Esq., Laber, Morrow & Lovallo, 131 East Broadway, Tucson 85701

Hon. Gary K. Nelson, Attorney General, 159 State Capitol, Phoenix 85007

Dennis W. DeConcini, Pima County Attorney 131 West Congress, Tucson 85701

Robert Bruce Moore, Jr., Arizona State Prison, Box B, Florence 85232

West Publishing Company, 50 Kellogg Blvd., St. Paul, Minnesota 55102

APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

May 21, 1973

John P. Frank, Esq.
Lewis & Roca
100 West Washington St.
Phoenix, Ariz. 85003

RE: MOORE v. ARIZONA,
No. 72-1335.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case.

Very truly yours,

MICHAEL RODAK, JR., Clerk
By

/s/ Helen Taylor

Helen Taylor, (Mrs.)
Assistant Clerk

William J. Schafer, III, Esq.
Chief Counsel - Crim. Div
Office of the Attorney General
159 Capitol Bldg.
Phoenix, Ariz. 85007

FILED: DEC. 18, 1973 - United States District Court for the District of Arizona By Deputy Clerk.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

ROBERT BRUCE MOORE, JR., Petitioner, vs. HAROLD CARDWELL, etc., Respondent.	No. Civ-73-724 Phx WEC ORDER

Petitioner, an inmate at the Arizona State Prison, seeks habeas corpus relief pursuant to 28 U.S.C. §2254.

Petitioner was charged with armed robbery and attempted murder, Following a trial that lasted twelve days the evidence was submitted to the jury. Twenty-Four hours after receiving the case, and after twelve hours of deliberation, the judge called the jury back into the courtroom. The judge asked the jury foreman

if it would be possible to reach a verdict. The foreman stated that the probability of reaching a verdict was not very good. The judge then asked the jury collectively whether anyone felt further deliberation might bring about a verdict. Only one juror felt that a verdict could be reached. The judge then sua sponte declared a mistrial and discharged the jury.

Petitioner now contends, as he did in his state court appeal, that the subsequent retrial violated the double jeopardy provisions of the United States Constitution. United States v. Perez, 22 U.S. 579 (1824), set the standard to be followed in determining whether a mistrial precludes further prosecution of the defendant. The Court stated:

> "We think, that in all cases of this nature [where jury was discharged after being unable to agree],

the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated." Id. at 579 (Emphasis added)

This standard was applied to the states in 1969. Benton v. Maryland, 395 U.S. 784 (1969)

The issue in the present case is whether the trial judge was warranted in finding that the jury was unable to agree, thereby bringing into play the doctrine of "manifest necessity". As was stated in Downum v. U.S., 372 U.S. 734, 737 (1963); "Each case must turn on its facts."

It was not an abuse of discretion for the trial judge in the present case to

declare a mistrial after polling the jurors and finding that eleven felt a verdict could not be reached, even after further deliberations. Defendant cites Cornero v. U.S., 48 F.2d 69 (9th Cir. 1931), for an indication of the Ninth Circuit's position on this issue. The case itself arose when the trial judge declared a mistrial when the prosecuting attorney stated that he could not proceed due to the absence of certain witnesses, hardly a factual situation to support the defendant's position in the present action. In fact, the Court, in backgrounding the law of double jeopardy recognized the discretion of the trial judge in declaring a mistrial when a jury is unable to agree on a verdict.

> "[S]ound discretion...is that discretion of the trial court involved in the determination of when and

> after how long a delibertaion of the jury should be discharged, for the reason that the accused is entitled to have the jury given a reasonable time to arrive at a verdict before a mistrial should be declared and the jury discharged". Id. at 72.

In U.S. v. Berniker, 439 F.2d 686 (9th Cir. 1971), the Court upheld the trial judge's action in declaring a mistrial when "the jury expressed its inability to reach a verdict..."

U.S. v. Lansdown, 460 F.2d 164 (4th Cir. 1972), is also purported by the defendant to be identical to the present case, however, it, too, is factually distinguishable. The trial judge in Lansdown declared a mistrial sua sponte based solely on his conclusion that the jury had deliberated long enough. The

The judge rejected statements from the jury that it was on the verge of a verdict and wished to continue. The appeals court stated:

> "While the length of deliberation is relevant factor, the more important consideration is whether there is a possibility that the jury can reach a verdict within a reasonable time."

In the present case the Court was informed that the jury was still divided numerically as it had been the previous night, that the foreman felt a verdict was not probable, and that eleven jurors felt further deliberations would reap no results. The trial judge was not abusing his discretion in considering these findings and declaring a mistrial.

IT IS ORDERED that the petition for a writ of habeas corpus be denied.

DATED this 13th day of December, 1973.

s/ Walter E. Craig
United States Distri t Judge

FILED: October 4, 1974 - U.S. Court of Appeals - Clerk

DO NOT PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT BRUCE MOORE, JR.	)	
	)	
Petitioner-Appellant,	)	No. 74-1327
	)	
vs.	)	
	)	MEMORANDUM
HAROLD CARDWELL, Warden.	)	
	)	
Respondent-Appellee.	)	
	)	

Appeal from the United States District Court - District of Arizona

Before: CARTER and HUFSTEDLER, Circuit Judges, and SCHNACKE,* District Judge.

The granting of a mistrial in a criminal case without the consent of the defendant when the jury is unable to reach a verdict, exercised in the sound discretion of the trial court, does not consitute double jeopardy. United States,

v. Perez, 22 U.S. (9 Wheat.) 579; Logan v. United States, 144 U.S. 263, 298 (1892).

There was no abuse of that discretion below.

Judgment affirmed.

---

* Hon. Robert H. Schancke, United States District Judge, Northern District of California, sitting by designation.

DECLARATION OF SERVICE

I, the undersigned, being first duly sworn, declare:

I am a citizen of the United States and a resident of the County of Pima, State of Arizona. I am over the age of eighteen years and not a party to the within entitled action.

My business address is 131 East Broadway, Tucson, Arizona, 85701.

On November 8, 1974 I served the within Petition for Writ of Certiorari on the Respondent in said action by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Tucson, Arizona, addressed as follows:

The Hon. N. Warner Lee
Attorney General, State
of Arizona
159 State Capitol Bldg.
PHOENIX, Arizona 85007

and

The Hon. William Saxbe
Attorney General of the
United States

Washington, D. C.

The Solicitor General
Washington, D. C.

J. A. LOVALLO

Subscribed and sworn to
before me this 8th day
of November 1974.

NOTARY PUBLIC

My Commission espires:

3-24-78

JAN 9 1975

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

NO. 74-692

ROBERT BRUCE MOORE, JR.,

Petitioner,

-vs-

HAROLD CARDWELL, Warden,

Respondent.

RESPONSE TO PETITION FOR
A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

W. WARNER LEE
The Attorney General

JOHN S. O'DOWD
Ass't Attorney General
415 West Congress
Tucson, Arizona

Attorney for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-692

ROBERT BRUCE MOORE, JR.,

Petitioner,

vs.

HAROLD CARDWELL, Warden,

Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

N. WARNER LEE
The Attorney General

JOHN S. O'DOWD
Ass't Attorney General
415 W. Congress
Tucson, Arizona

Attorney for Respondent

I N D E X

	Page
TABLE OF CASES AND AUTHORITIES . . .	ii,iii iv,v
QUESTION PRESENTED	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	
JURISDICTIONAL STATEMENT	
ARGUMENT	2
I	
PETITIONER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BY THE STATE TRIAL COURT	
CONCLUSION	11

TABLE OF CASES AND AUTHORITIES

Cases	Page
Brewster v. Swope 180 F.2d 984 (9th Cir. 1950)	8
Downum v. United States 372 U.S. 734 83 S.Ct. 1033 10 L.Ed.2d 100(1963)	3,9,11
Dreyer v. Illinois 187 U.S. 71 23 S.Ct. 28 47 L.Ed. 79 (1902)	4
Forsberg v. United States 351 F.2d 242 (9th Cir. 1965)	6
Gori v. United States 367 U.S. 364 81 S.Ct. 1523 6 L.Ed.2d 901 (1961)	4,9,11
Himmelfarb v. United States 175 F.2d 924 (9th Cir. 1949)	8
Howard v. United States 372 F.2d 294 (9th Cir. 1967)	6
Keerl v. Montana 213 U.S. 135 29 S.Ct. 469 53 L.Ed. 734 (1909)	4

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
Illinois v. Somerville 410 U.S. 458 93 S.Ct. 1066 35 L.Ed.2d 425 (1973)	3,9,10,11
Logan v. United States 144 U.S. 263 12 S.Ct. 617 36 L.Ed. 429 (1892)	4
Lovato v. New Mexico 242 U.S. 199 37 S.Ct. 107 61 L.Ed. 244 (1916)	4
Moore v. Arizona 412 U.S. 906 93 S.Ct. 2292 36 L.Ed.2d 971 (1973)	2
Moore v. Cardwell No. Civ. 73-724 PHX. (WEC) (Order, filed Dec. 18,1973)	7
Oelke v. United States 389 F.2d 668 (9th Cir. 1967)	8
Simmons v. United States 142 U.S. 148 12 S.Ct. 171 35 L.Ed. 968 (1891)	4

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
State v. Moore 108 Ariz. 532 502 P.2d 1351 (1972)	1
Thompson v. United States 155 U.S. 271 15 S.Ct. 73 39 L.Ed. 146 (1894)	4
Tolan v. United States 370 F.2d 799 (9th Cir. 1967)	6,8
United States v. Dinitz 492 F.2d 53 (5th Cir. 1974)	3
United States v. Goldstein 479 F.2d 1061 (2nd Cir. 1973)	7
United States v. Jorn 400 U.S. 470 91 S.Ct. 547 27 L.Ed.2d 543 (1971)	3,9,11
United States v. Lansdown 460 F.2d 164	6
United States v. Medansky 486 F.2d 807 (7th Cir. 1973)	5

TABLE OF CASES AND AUTHORITIES (Con'd)

Cases	Page
United States v. Moon 491 F.2d 1047 (5th Cir. 1974)	5
United States v. Perez 22 U.S. (9 Wheat.) 579 6 L.Ed. 165 (1824)	2,9
Wade v. Hunter 336 U.S. 684 69 S.Ct. 834 93 L.Ed. 974 (1949)	4,11

QUESTION PRESENTED

I. WAS PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM BEING TWICE PLACED IN JEOPARDY FOR THE SAME OFFENSE VIOLATED WHEN THE STATE TRIAL COURT DISMISSED THE DEADLOCKED JURY DURING PETITIONER'S FIRST TRIAL?

STATEMENT OF THE CASE
STATEMENT OF FACTS
JURISDICTIONAL STATEMENT

Respondent accepts Petitioner's Statement of the Case and Statement of Jurisdiction contained in his petition for certiorari. In addition, Respondent wishes to apprise the court that the decision of the Supreme Court of Arizona in State v. Moore, is reported at 108 Ariz. 532, 502 P.2d 1351 (1972), and this court's denial of Petitioner's Petition for a Writ of Certiorari in

Moore v. Arizona is reported at 412 U.S. 906, 93 S.Ct. 2292, 36 L.Ed.2d 971 (1973). Also, the U.S. Court of Appeals (9th Cir.) affirmed the judgment of the U.S. District Court in this cause on October 4, 1974. (Memorandum, Cause No. 74-1327).

ARGUMENT

I

PETITIONER'S RIGHT TO BE FREE FROM DOUBLE JEOPARDY WAS NOT VIOLATED BY THE STATE TRIAL COURT.

As this court is well aware, the benchmark decision of this court in the area of double jeopardy is United States v. Perez, 22 U.S. (9 Wheat) 579, 6 L. Ed. 165 (1824). In that decision, this court stated:

> We think, that in all cases of this nature [where the jury was discharged after being unable to agree], the

> law has invested courts of justice with the authority to discharge a jury from giving any verdict, when, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act or the ends of public justice would otherwise be defeated. Id. at 579, 6 L.Ed. at 165, emphasis added.
>
> Inspired by [this] language in Perez, subsequent cases have consistently applied this test on a case by case basis and refused to catalogue specifically the circumstances in which the declaration of a mistrial would be supported by "manifest necessity" or the "ends of public justice". United States v. Dinitz, 492 F.2d 53, 57 (5th Cir. 1974)

See Illinois v. Somerville, 410 U.S. 458, 93 S.Ct. 1066, 35 L.Ed.2d 425 (1973); United States v. Jorn, 400 U.S. 470, 91 S.Ct. 547, 27 L.Ed.2d 543 (1971); Downum v. United States, 372 U.S. 734,

83 S.Ct. 1033, 10 L.Ed.2d 100 (1963); Gori v. United States, 367 U.S. 364, 81 S.Ct. 1523, 6 L.Ed.2d 901 (1961); Wade v. Hunter, 336 U.S. 684, 69 S.Ct. 834, 93 L.Ed. 974 (1949); Lovato v. New Mexico, 242 U.S. 199, 37 S.Ct. 107, 61 L.Ed. 244 (1916); Keerl v. Montana, 213 U.S. 135, 29 S.Ct. 469, 53 L.Ed. 734 (1909); Dreyer v. Illinois, 187 U.S. 71, 23S.Ct. 28, 47 L. Ed. 79 (1902); Thompson v. United States, 155 U.S. 271, 15 S.Ct. 73, 39 L.Ed. 146 (1894); Logan v. United States, 144 U.S. 263, 12 S.Ct. 617, 36 L.Ed. 429 (1892); Simmons v.United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891).

Perez, "does not speak in terms of a duty incumbent on the court, but characterizes the court's responsibility as an 'exercise [of] sound discretion' and

a 'power [which] ought to be used with the greatest caution'. The issue therefore is not whether the [trial] judge violated a duty in declaring a mistrial, but whether the court abused its discretion in exercising that power." United States v. Medansky, 486 F.2d 807, 811 (7th Cir. 1973).

> There is no mechanical formula to be applied, but rather the focus is upon the propriety of the trial judge's exercise of his discretion in granting the mistrial, taking into account all circumstances relevant to the particular trial. United States v. Moon, 491 F.2d 1047, 1049 (5th Cir. 1974).

There exists ample precedent, therefore, to support the trial court's ruling in this case that the jury's genuine inability to agree on a verdict constituded "manifest necessity" warranting

the declaration of a mistrial. See United States v. Lansdown, 460 F.2d 164, 166 (4th Cir. 1972); Howard v. United States, 372 F.2d 294 (9th Cir. 1967), cert.denied 388 U.S. 915, 87 S.Ct. 2129, 18 L.Ed.2d 1356 (1967); Tolan v. United States, 370 F.2d 799 (9th Cir. 1967), cert. denied 387 U.S. 932, 87 S.Ct. 2049, 18 L.Ed.2d 994 (1967); Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), cert. denied 383 U.S. 950, 86 S.Ct. 1209, 16 L.Ed.2d 212 (1966).

> Requiring a jury to continue deliberations despite genuine and irreconcilable disagreement more often than not defeats the ends of public justice; not only will such compulsion needlessly waste valuable judicial resources, it may coerce erroneous verdicts. On this view of the case, the only question presented to us, therefore, is whether [the

> trial judge] abused his discretion in concluding when he did that the jury was in fact genuinely hung. United States v. Goldstein, 479 F.2d 1061, 1068 (2nd Cir. 1973).

Respondent submits that the Arizona trial court committed no error in declaring a mistrial of petitioner's first trial. As Judge Craig pointed out in his order dismissing the petition for a writ of habeas corpus, "the court was informed that the jury was still divided numerically as it had been the previous night, that the foreman felt a verdict was not probable, and that eleven jurors felt further deliberations would reap no results." Moore v. Cardwell, No. Civ. 73-724 PHX. (WEC) (Order, filed December 18, 1973).

It has pointed out many times that

a "defendant who pleads double jeopardy has the burden of proving abuse of [the court's] discretion." Oelke v. United States, 389 F.2d 668, 671 (9th Cir. 1967), cert. denied 390 U.S. 1029, 88 S.Ct. 1421, 20 L.Ed.2d 286 (1968). See also Tolan v. United States, supra; Himmelfarb v. United States, 175 F.2d 924 (9th Cir. 1949); Brewster v. Swope, 180 F.2d 984 (9th Cir. 1950). Petitioner clearly has failed to establish such an abuse of discretion. Instead, he seeks to have this court ignore the long line of decisions, cited supra, which are based upon the fountainhead decision of Perez, and to establish a new, strict, mechanical formula by which to judge the propriety of declaring a mistrial. The courts have steadfastly

rejected such a proposition. Petitioner states that "United States v. Jorn, supra, represents the latest in a line of cases which has the practical effect of narrowing the discretion of the trial judge to declare a mistrial." (Petition for Writ, at 15). Petitioner also cites Downum and Gori in support of this proposition. Respondent totally rejects the contention that the Supreme Court has been conducting a "narrowing" process with regard to Perez. Indeed, this court answered such contentions recently in Illinois v. Somerville, supra:

> In Downum, the court held, as respondent argues, that jeopardy "attached" when the first jury was selected and sworn. But in cases in which a mistrial has been declared prior to verdict, the conclusion that jeopardy has attached begins, rather

than ends, the inquiry. . . That, indeed, was precisely the rationale of Perez and subsequent cases. Only if jeopardy has attached is a court called upon to determine whether the declaration of a mistrial was required by "manifest necessity" or the "ends of public justice." 410 U.S. at 467-468, 93 S.Ct. at 1072, 35 L.Ed.2d at 433.

This court further stated in Illinois v. Somerville, supra, that:

Given the established standard of discretion set forth in Perez, Gori, and Hunter, we cannot say that the declaration of a mistrial was not required by "manifest necessity" and the "ends of public justice."

Our decision in Jorn * * * does not support the opposite conclusion. While it is possible to excuse various portions of the plurality opinion * * * divorcing the language from the facts of the case serves only to distort its holdings. * * *The court's opinion in Jorn is replete with

> approving references to Wade v. Hunter. * * * 410 U.S. at 469, 93 S.Ct. at 1073, 35 L.Ed.2d at 434.

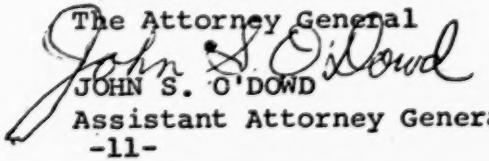
Clearly, this court has not retreated from Perez in either Downum, Gori, Hunter, Jorn or Somerville. Petitioner's arguments to the contrary are without merit.

CONCLUSION

The factual record clearly shows that the Arizona trial court properly exercised its discretion in ordering a mistrial upon ascertaining that Petitioner's first jury was hung. Therefore, Petitioner's incarceration in the Arizona State Prison is lawful and this petition for writ of certiorari should be denied.

Respectfully submitted,

N. WARNER LEE
The Attorney General



JOHN S. O'DOWD
Assistant Attorney General